CHENG HENG PING & ORS

v.

PERWIRA AFFIN BANK BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-264 OF 1997]
1 NOVEMBER 1998

COMPANY LAW: *Directors - Wound up company - Official Assignee appointed as liquidator - Whether former directors have locus standi to pursue cause of action on behalf of wound up company - Whether it is official assignee who has discretion to proceed on behalf of company - Whether lifting corporate veil will aid directors - Companies Act 1965, ss. 233(1) & (2), 261(4)*

CIVIL PROCEDURE: *Locus standi - Directors of wound up company - Official Assignee appointed as liquidator - Whether former directors have locus standi to pursue cause of action on behalf of wound up company - Whether it is official assignee who has discretion to proceed on behalf of company - Whether lifting corporate veil will aid directors - Companies Act 1965, ss. 233(1) & (2), 261(4)*

CIVIL PROCEDURE: *Action - Cause of action - Duplicity - Company given liberty to institute claim against bank prior to winding up but fails to do so - Former directors institutes claim against bank based on same cause of action - Whether amounts to duplicity of action - Whether an abuse of process of court - Whether directors have locus standi to institute action*

CONTRACT: *Privity - Directors of wound up company - Loan granted to company - Directors stood as guarantors - Withdrawal of loan facility - Whether directors have right to file action against bank - Whether privity of contract exists between directors and bank - Rule in Foss v. Harbottle*

CIVIL PROCEDURE: *Striking out - Where is the power of striking out derived from - When ought court accede to application to strike out - Rules of the High Court 1980, O. 18 r. 19*

CIVIL PROCEDURE: *Counterclaim - Nature and rationale of - By when ought counterclaim be pleaded - Rules of the High Court 1980, O. 15 r. 2(3)*

CONTRACT: *Guarantee - Definition of - Liability of surety - Whether contingent upon existence of valid debt*

The plaintiffs were the directors of one Campall Industries Sdn Bhd ('the company') which has since been wound up and placed under the control of the Official Assignee as the liquidator. The defendant bank had extended a credit facility to the company for which the plaintiffs stood as guarantors. By reason of the company's default in making repayments, the defendant terminated the credit facility and proceeded to file an action ('the other action') against the company and the plaintiffs as guarantors. The company, meanwhile, filed a counterclaim in the other action contending that the failure of the defendant bank to allow the company to use the full credit facility amounted to a breach of the loan contract entered into to secure the said credit facility. This notwithstanding, the defendant applied for summary judgment against the company and the plaintiffs. Summary judgment against the plaintiffs was ordered but the company was allowed to proceed with their counterclaim against the defendant. However, the company failed to proceed with their counterclaim.

The present suit is brought by the plaintiffs against the defendant for failing to make available the entire credit facility to the company thereby breaching the aforesaid loan contract. The defendant successfully applied to strike out the writ of summons and the plaintiffs' statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 ('the RHC') and this was the consequential appeal. In arguing this appeal, the plaintiffs urged the court to lift the company's corporate veil to assist them.

Held:

[1] The power of striking out is for the purpose of ensuring that any claim which is brought or for that matter any defence which is raised has a basis on which the court may eventually adjudicate. The striking out power is derived from O. 18 r. 19 of the RHC as well as the inherent jurisdiction of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[1a] The court is always wary and will not simply accede to an application to strike out an endorsement or pleading unless there is a very clear case for striking out. The court will certainly let plaintiffs proceed with their action unless their case is wholly and clearly unarguable. The mere fact that the case is not strong and unlikely to succeed is not a ground for striking out.

[2] A guarantee is essentially a promise by one person (referred to as the 'surety' or 'guarantor') to answer for the default of another (commonly referred to as the 'principal debtor') or to perform a promise to a third person (commonly referred to as the 'creditor').

[3] The principal debtor in the present case is the company. The surety's liability is contingent upon the existence of a valid debt due from the principal debtor to the creditor.

[4] By virtue of O. 15 r. 2(3) of the RHC, a counterclaim is a cross-action and is independent of the main action.

[4a] The rationale of allowing a counterclaim to be pleaded is to enable the defendant to pursue his claim against the plaintiff or additional persons in the same action rather than bring separate proceedings.

[4b] A counterclaim will only be recognised if it is properly pleaded. A counterclaim must be pleaded in time for the simple reason that the court will not give effect to the counterclaim once the plaintiff obtains a judgment.

[5] The plaintiffs' cause of action in the present suit is the same as the counterclaim of the company in the other action. Since the company has been wound up, pursuant to s. 233(1) & (2) of the Companies Act 1965, it is the Official Assignee as the appointed liquidator who has the discretion to proceed on behalf of the company. Thus, the plaintiffs in pursuing the present action is in fact abusing the process of the court.

[5a] The plaintiffs as the former directors of the company have no *locus standi* to institute this action. Section 261(4) of the Companies Act 1965 prevents the plaintiffs from deciding the fate of the company's counterclaim in the other action.

[6] The credit facility was extended to the company only. The company was a separate entity different from the directors and shareholders. If the company felt that the defendant had breached the loan contract by refusing to allow the usage of the balance of credit facility, the right to seek redress and file the present suit should be accorded to the company and not to the plaintiffs.

[6a] The rule in *Foss v. Harbottle* when applied to the present case would greatly impede the plaintiffs here. There was no privity of contract between the plaintiffs and the defendant in regard to the credit facility which was extended to the company. The doctrine of privity of contract provides that only the parties to a contract can enjoy the benefits of that contract or suffer the burdens of it.

[7] After the company had been wound up, all the properties of the company came under the control of the Official Assignee as the liquidator. When the present suit was filed, the plaintiffs were no longer in control of the company and therefore the plaintiffs have no legitimate right to proceed with the present suit. To allow the plaintiffs to proceed with the present suit would tantamount to giving them the right to claim on behalf of the company at the expense of the Official Assignee and other creditors of the company.

[8] Lifting the corporate veil of the company would show that all the plaintiffs were the former directors and they stood as guarantors for the credit facility. The defendant did not extend the credit facility to the plaintiffs but to the company. The company was the aggrieved party when the defendant withdrew the rest of the credit facility and thus it is the company that has the *locus standi* to file the present proceedings and not the plaintiffs. Lifting the corporate veil of the company, therefore, cannot assist the plaintiffs at all.

[Appeal dismissed.]

Cases referred to:

Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 ***(aff)***
AG of the Duchy of Lancastrer v. L & NW Railway Co [1892] 3 Ch 274 ***(aff)***
Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman [1986] 1 MLJ 426 ***(aff)***
CSI International Co Ltd v. Archway Personel (Middle East) Ltd [1980] 1 Lloyd's Rep 1069 ***(aff)***
DHN Food Distributors Ltd v. Tower Hamlets London Borough Council [1976] 1 WLR 852 ***(refd)***
Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd [1915] AC 847 ***(foll)***
Dyson v. AG [1911] 1 KB 410 ***(aff)***
F Wirral Metropolitan Borough Council [1991] 2 WLR 1132 ***(refd)***
Foss v. Harbottle [1843] 2 Hare 461 ***(foll)***
Gilford Motor Co v. Horne [1933] Ch 935 ***(refd)***
Jamir Hassan v. Kang Min [1992] 2 MLJ 46 ***(aff)***
Hubbuck v. Wilkinson [1899] 1 QB 86 ***(aff)***
Lakeman v. Mountstephen [1874] LR 7 HL 17 ***(aff)***
Low Fong Mei & Anor v. Ko Teck Siang & Ors [1989] 3 MLJ 149 ***(aff)***
Moore v. Lawson 31 TLR 418 ***(aff)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 AMR 631 ***(aff)***
Permodalan Plantation Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 MLJ 160 ***(aff)***
Perwira Habib Bank Malaysia Bhd v. Syarikat Johor Tenggara Sdn Bhd & Anor [1989] 2 MLJ 476 ***(aff)***
PH Grace Pte Ltd & Ors v. American Express International Banking Corporation [1987] 1 MLJ 437 ***(foll)***
Re David Lim Hong Kee ex p Perwira Habib Bank Malaysia Bhd [1996] 1 AMR 105 ***(aff)***
Re Singapore Souvenir Industry (Pte) Ltd [1986] 1 MLJ 14 ***(aff)***
Resources Mining Pte Ltd v. Puteh Abdullah & Ors [1989] 3 MLJ 393 ***(aff)***
Yeoman Credit Ltd v. Latter [1961] 1 WLR 828 ***(aff)***

Legislation referred to:

Companies Act 1965, ss. 233(1), (2), 261(4)
Contract Act 1950, s. 79
Rules of the High Court 1980, O. 15 r. 2(3), O. 18 r. 19

For the plaintiffs - Faizal Abu Bakar; M/s Bala & Co
For the defendant - Neoh Lay Choo; M/s Tay & Partners

Reported by S Dharmendran

JUDGMENT

Abdul Malik Ishak J:

In encl. 27 the plaintiffs filed an appeal to the judge-in-chambers against the decision of the deputy registrar ("DR") dated 3 August 1998 wherein the DR allowed the defendant's application by way of a summons-in-chambers in encl. 11 to strike out the writ of summons and the statement of claim of the plaintiffs under O. 18 r. 19 of the Rules of the High Court 1980 ("RHC"). The power of striking out is for the purpose of ensuring that any claim which is brought or for that matter any defence which is raised has a basis on which the court may eventually adjudicate. The striking out power is derived from O. 18 r. 19 of the RHC as well as the inherent jurisdiction of the court to "make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court" (*Jamir Hassan v. Kang Min* [1992] 2 MLJ 46; *Low Fong Mei & Anor v. Ko Teck Siang & Ors* [1989] 3 MLJ 149 and *Re Singapore Souvenir Industry (Pte) Ltd* [1986] 1 MLJ 14). But the court is always wary and will not simply accede to an application to strike out an endorsement or pleading unless there is a very clear case for striking out (*Resources Mining Pte Ltd v. Puteh bte Abdullah & Ors* [1989] 3 MLJ 393; *Hubbuck v. Wilkinson* [1899] 1 QB 86 at p. 91; *AG of the Duchy of Lancaster v. L & NW Railway Co* [1892] 3 Ch 274; and *Dyson v. AG* [1911] 1 KB 410, at p. 419). The court will certainly let the plaintiffs here to proceed with their action unless their case is wholly and clearly unarguable. The English Court of Appeal in *F. Wirral Metropolitan Borough Council* [1991] 2 WLR 1132 was bold enough when it held that the statement of claim had been properly and correctly struck out as it was not open to the court to recognise the existence of an independent tort of interference in regard to parental rights. At any rate, the English Court of Appeal too held that the claim in negligence was statute-barred. However, it is desirable to sound a note of warning. The mere fact that the case is not strong and unlikely to succeed is not a ground for striking out (*Moore v. Lawson* 31 TLR 418). As to when an O. 18 r. 19 application ought to be made, I need only refer to the case of *Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman* [1986] 1 MLJ 426 where at p. 635, Zakaria Yatim J (now FCJ) said:

> The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See *The Supreme Court Practice* [1985] (Vol. 1) at p. 304.

With these principles in mind, I will now proceed to consider encl. 27.

Brief Facts

The defendant's application for striking out in encl. 11 was supported by an affidavit of Azhar bin Ahmad that was affirmed on 17 April 1998 and filed on 20 April 1998 as reflected in encl. 10. The first, second and fifth plaintiffs filed separate affidavits each as reflected in encls. 13, 17 and 15 which were affirmed on 29 April 1998 and filed on the same date namely 4 May 1998. But alas, the third and fourth plaintiffs did not file affidavits at all and they must be taken to be agreeable to the striking out as filed by the defendant in encl. 11. The third and fourth plaintiffs too must be held to be agreeable to the affidavit filed by Azhar bin Ahmad in encl. 10 (*Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 AMR 631; and *Abdul Razak bin Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 2 AMR 1174; [1995] 2 MLJ 287; [1995] 4 CLJ 339). Azhar bin Ahmad too filed an additional affidavit on 18 September 1998 as reflected in encl. 28 and that additional affidavit was also affirmed on the same date and it sought to show a letter of offer from the defendant to Campall Industries Sdn Bhd dated 18 December 1990 which was signed by the latter. Enclosure 28 was in fact filed to supplement encl. 10 exh. "D" which also exhibited the same letter of offer from the defendant to Campall Industries Sdn Bhd but without the signature of the latter.

It was through this very letter of offer that the defendant extended to Campall Industries Sdn Bhd the use of the bank's export credit refinancing facility of RM3 million (hereinafter referred to as the "ECR facility"). All the plaintiffs jointly and severally guaranteed the repayment of that ECR facility of RM3 million that was extended to Campall Industries Sdn Bhd. The defendant released partially that ECR facility to the tune of RM1.4 million between the period from 16 September 1991 to 30 March 1992 to Campall Industries Sdn Bhd (hereinafter referred to as "Campall" for short). By 22 April 1992, the sum that was payable under that ECR facility came up to a hefty figure of RM1,067,366 and it was this sum that Campall was supposed to pay but failed to pay. Since Campall refused to pay that sum, the defendant acted prudently by terminating the ECR facility and proceeded to file a Civil Suit no: 22-237-1992 in the Johor Bahru High Court against Campall and all the present plaintiffs as guarantors. Section 79 of the Contracts Act 1950 defines a guarantee as a "contract to perform the promise, or discharge the liability, of a third person in case of his default." Put in another way, a guarantee is essentially a promise by one person (referred to as the "surety" or "guarantor") to answer for the default of another (commonly referred to as the "principal debtor") or to perform a promise to a third person (commonly referred to as the "creditor"). Lord Selborne in *Lakeman v. Mountstephen* [1874] LR 7 HL 17 once remarked that:

> There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto* and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed.

In the context of the present case, the principal debtor must surely be Campall. Now, the surety's liability is contingent upon the existence of a valid debt due from the principal debtor to the creditor. Holroyd Pearce LJ in *Yeoman Credit Ltd v. Latter* [1961] 1 WLR 828 had this to say of a guarantee:

> Since a guarantee is by definition an obligation to answer for the debt, default or miscarriage of another, there cannot, in respect of a void contract, be any debt, default or miscarriage to answer for.

Reverting back to the mainstream of the case, in civil suit no: 22-237-1992 Campall filed a counterclaim which stated that the defendant here had breached the contract by refusing to allow Campall to use the whole of the ECR facility and Campall sought damages flowing thereto. The present defendant swiftly filed an application for summary judgment against Campall and all the present plaintiffs and the judge who heard that application on 9 September 1994 ordered summary judgment against all the present plaintiffs for debts amounting to RM998,451.97 together with interest and costs. The judge also ordered that Campall, which was wound up on 20 March 1993 *vide* Johor Bahru High Court Winding Up Petition number 42-34-92(1), was free to proceed with their counterclaim against the present defendant. It is germane to highlight a very significant fact and that is that the present Civil Suit no: 22-264-1997 is the same as the counterclaim of Campall in Civil Suit no: 22-237-1992. Campall has failed to proceed with their counterclaim till today. On these factual background, the present Civil Suit no: 22-264-1997 should be struck off. This meant that the appeal to the judge-in-chambers in encl. 27 should be dismissed with costs. In fact Mr. Faizal bin Abu Bakar, learned counsel for all the plaintiffs, knew that he was going on an uphill task in pursuing encl. 27 and he magnanimously agreed that the appeal in encl. 27 should be dismissed with costs. I made orders to that effect forthwith. However, out of deference to Mr. Faizal bin Abu Bakar, I felt constrained to put my thoughts on paper for the sake of posterity.

Counterclaim

What is a counterclaim? It is a cross-action and is independent of the main action (O. 15 r. 2(3) of the RHC). Salleh Abas LP in *Permodalan Plantation Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 MLJ 160, 161 observed:

> A counterclaim on the other hand is also a cross-claim which a defendant has against a plaintiff but in respect of which the defendant can bring a separate action against the plaintiff if he wishes to do so. Thus, to all intents and purposes a counterclaim is a separate and independent action by the defendant, which the law allows to be joined to the plaintiff's action in order to avoid multiplicity or circuity of suits.

The rationale of allowing a counterclaim to be pleaded is to enable the defendant to pursue his claim against the plaintiff or additional persons in the same action rather than bring separate proceedings. A counterclaim will only be recognised if it is properly pleaded. A counterclaim must be pleaded in time for the simple

reason that the court will not give effect to the counterclaim once the plaintiff obtains a judgment (*CSI International Co Ltd v. Archway Personel (Middle East) Ltd* [1980] 1 Lloyd's Rep 1069).

Duplicity

The present plaintiffs' cause of action in Civil Suit no: 22-264-1997 is the same as the counterclaim of Campall in Civil Suit no: 22-237-1992. The order of the judge in Civil Suit no: 22-237-1992 gave liberty to Campall to proceed with their counterclaim.

Even though Campall has been wound up, the Official Assignee as the appointed liquidator has the discretion to proceed on behalf of Campall (see sub-ss. (1) and (2) of s. 233 of the Companies Act 1965). In similar vein, Thean J said in the case of *P.H. Grace Pte Ltd & Ors v. American Express International Banking Corporation* [1987] 1 MLJ 437 CA, particularly at p. 440:

> ... though a winding-up order has been made the first defendant can still pursue the counterclaim against the plaintiff if its liquidator decides to do so.

It is crystal clear that the present plaintiffs in pursuing the present Civil Suit in this court was in fact abusing the process of the court. The first, second and fifth plaintiffs in their separate affidavits in encls. 13, 17 and 15 particularly at para 10 had the audacity to say:

> Saya telah mengarahkan peguamcara saya untuk tidak meneruskan dengan tuntutan balas oleh defendan pertama di Mahkamah Tinggi Johor Bahru Guaman Sibil no: 22-237-1992 kerana fakta bahawa Campall Industries Sdn Bhd telah berada di dalam liquidasi pada 20hb Mac 1993 dan saya sesungguhnya percaya bahawa sebagai bekas pengarah syarikat dan saya juga sesungguhnya percaya ianya bukan untuk kepentingan saya.

But the crucial question to pose would be whether the present plaintiffs as the former directors of Campall have the *locus standi* to do so. The answer would certainly be in the negative. Section 261(4) of the Companies Act 1965 shackled the present plaintiffs to the ground and prevents them from deciding the fate of Campall's counterclaim in Civil Suit no: 22-237-1992. That section is worded thus:

> On the appointment of a liquidator all the powers of the directors shall cease, except so far as the committee of inspection, or if there is no such committee the creditors, approve the continuance thereof.

Locus Standi And Privity Of Contract

The present plaintiffs have no *locus standi* or capacity to pursue the present Civil Suit no: 22-264-1997 for the following reasons:

(1) The ECR facility was extended by the present defendant to Campall only. Campall was a separate entity different from the directors and the shareholders. If Campall were to say that the present defendant had breached the contract by refusing to allow usage of the balance of the ECR facility, then the right to seek redress and file the present Civil Suit no: 22-264-1997 should be accorded to Campall and not to the present plaintiffs. The rule in *Foss v. Harbottle* [1843] 2 Hare 461 states, *inter alia*, that the proper plaintiff for a wrong done to the company is the company itself. If the actions of the directors of the company constitute a wrong to the company, it is the company that should take action against the directors and not the individual shareholder. This is the result of the company being a separate legal entity. Surely the rule in *Foss v. Harbottle (supra)* when applied to the present case would greatly impede the present plaintiffs in their Civil Suit no: 22-264-1997. There was no privity of contract between the present plaintiffs and the present defendant in regard to that ECR facility that was extended to Campall. The doctrine of privity of contract provides that only the parties to a contract can enjoy the benefits of that contract or suffer the burdens of it. Viscount Haldane L.C. in *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* [1915] AC 847 (HL) had occasion to say something of the doctrine of privity of contract. This was what his Lordship said:

> My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam.*

Perusing through paras. 14, 15 and 16 of the present plaintiffs' statement of claim together with paras. 6, 8 and 11 of the affidavits in encls. 13, 17 and 15, it was quite plain that the present plaintiffs had fallen into error and had wrongly misconceived their roles. As I said, the ECR facility was extended to Campall and not to the present plaintiffs individually as directors of Campall. The right to counterclaim against the present defendant in Civil Suit no: 22-237-1992 rested entirely with Campall and no one else – not even the present plaintiffs.

(2) After Campall had been wound up, all the properties of Campall came under the control of the Official Assignee as the liquidator. Now, when the present suit was filed on 18 September 1997, the present plaintiffs were no longer in control of Campall and therefore the present plaintiffs have no legitimate right to proceed with the present suit. To allow the present plaintiffs to proceed with the present suit would tantamount to giving them the right to claim on behalf of Campall at the expense of the Official Assignee and other creditors

of Campall. This would open the floodgate. Imagine the situation where former directors or shareholders of a company that has been wound up, take control and oust the liquidator by filing a civil suit against the debtors of the company in their individual names and benefit themselves only without regard to the liquidator and the creditors of the company. Chaos would prevail. The rights of the liquidator and creditors would be at stake. In my judgment, it was an abuse of the process of the court when the present plaintiffs filed the present civil suit.

(3) As guarantors, the present plaintiffs have no right to utilise the counterclaim of Campall in Civil Suit no: 22-237-1992 to the present suit – namely Civil Suit no: 22-264-1997 (*Perwira Habib Bank Malaysia Bhd v. Syarikat Johor Tenggara Sdn Bhd & Anor* [1989] 2 MLJ 476, 478 and *David Lim Hong Kee; Re: Ex Parte Perwira Habib Bank Malaysia Berhad* [1996] 1 AMR 105). Certainly the present plaintiffs as guarantors cannot avail themselves of the counterclaim of Campall in Civil Suit no: 22-237-1992 in order to advance their cause in the present suit.

Lifting The Corporate Veil

I am urged to lift the corporate veil of Campall in order to assist the present plaintiffs. In *Gilford Motor Co v. Horne* [1933] Ch 935, the veil of incorporation was lifted to prevent the deliberate evasion of a contractual obligation. In *D.H.N. Food Distributors Ltd v. Tower Hamlets London Borough Council* [1976] 1 WLR 852, [1976] 3 All ER 462, the veil of incorporation was lifted to allow a group of associated companies to be treated as one. Now, lifting the corporate veil of Campall would show that all the present plaintiffs were the former directors and they stood as guarantors to that ECR facility. The present defendant did not extend that ECR facility to all the present plaintiffs but merely gave it direct to Campall. Campall was the aggrieved party when the present defendant withdrew the rest of the ECR facility and Campall has the *locus standi* to file Civil Suit no: 22-264-1997 – the present proceedings, and not the present plaintiffs. Lifting the corporate veil of Campall cannot assist the present plaintiffs at all. This was my judgment and I so hold accordingly.

For the reasons adumbrated above, I dismissed encl. 27 with costs.